

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SOKOLOW, et al, : 04-CV-397 (GBD)
:
Plaintiffs, : November 20, 2011
:
v. : 500 Pearl Street
: New York, New York
PALESTINE LIBERATION ORGANIZATION, et al, :
:
Defendants. :
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TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE
BEFORE THE HONORABLE RONALD L. ELLIS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 THE CLERK: In the matter of Mark Sokolow, *et al.*, v.
2 the Palestine Liberation Organization, et al.

3 All counsel, please identify yourself for the record.
4 Please stand when addressing the Court.

5 MR. SCHOEN: David Schoen, Your Honor, with Alan
6 Bauer for the plaintiffs.

7 MR. SOLOMON: Aaron Solomon, Brooklyn, New York for
8 the plaintiffs.

9 THE COURT: Good afternoon.

10 MR. HILL: Good afternoon, Your Honor. Brian Hill
11 for defendants.

12 MR. ROCHON: And Mark Rochon for the defendants.
13 Good afternoon, Your Honor.

14 THE COURT: Good afternoon. I note, first of all,
15 that I was handed this from the plaintiffs. I want to say as
16 an initial matter, it's bad form to give the judge something
17 like this as he's coming into a conference regardless of the
18 subject matter, but we will talk about that in due course. I
19 assume the defendants got a copy today also.

20 MR. HILL: We received a copy by ECF last night
21 around 8:00 o'clock.

22 THE COURT: And you've totally digested it, no doubt.

23 MR. HILL: Your Honor, we're prepared to address it
24 today. I think it's properly denied on any number of grounds.
25 And to cut to the chase, we'd ask you to deny it today or at

1 least put the plaintiffs on notice that they're not going to
2 get an automatic grant by doing what they did, which is filing
3 something on the eve of the hearing that didn't comply with the
4 Local Rule, that didn't comply with Judge Daniels' direction to
5 have a pre-hearing conference with Your Honor, and it did not
6 even follow meet and confer with us about either the substance
7 of the motion or the things that are complained about in the
8 motion. Sort of a transparent effort to grant themselves an
9 extension by giving you something they hope you won't be able
10 to rule on quickly enough and, therefore, will find some -- an
11 automatic extension. We can talk about this in as much detail
12 as Your Honor wants.

13 THE COURT: All right. Well, we'll get to that.

14 First, with respect to the things that were pending
15 this morning before I came in or at least before Sandy struck,
16 there's a question of the defendants' request for sanctions
17 based upon the plaintiffs' response to interrogatory seeking to
18 identify witnesses with knowledge about arrest, release from
19 detention by the PA of five individuals. I don't think it's
20 necessary to impose sanctions, although my review indicates
21 that the responses have the same general broad brush that I had
22 found issue with before and that is that it just -- it was not
23 basically designed to identify individuals who could be called
24 as witnesses because they had firsthand knowledge.

25 And therefore, since it appeared there was not an

1 attempt to divide people into categories of people who would
2 be -- who would have that firsthand knowledge to the extent
3 that the individuals who have been identified by the plaintiffs
4 who have been identified so broadly, I'm -- I considered those
5 identifications a nullity and I -- what I will order is that to
6 the extent that there are individuals that are listed, they are
7 precluded from being witnesses since the idea is to identify
8 people who could be deposed. It did not do that for me and so
9 if -- it's just not going to happen.

10 With respect to the defendants' motion to preclude
11 the plaintiffs from deposing Interzar Al-Wahzier [Ph.], that
12 motion by the defendants is granted. I don't see anything that
13 indicates that the particular witness is a high enough
14 individual such that their deposition would be necessarily
15 ordered and frankly the letter of reference to Palestinian
16 martyrs doesn't really give me any traction that it's likely to
17 lead to any relevant evidence.

18 With respect to the defendants' motion to compel the
19 production of any documents concerning Janice Coulter's
20 reported involvement with a vehicular homicide when she was a
21 youth, that motion is denied. And similar to my ruling with
22 respect to the other witness who there may have been something
23 in their past, again, I don't see any indication that this is
24 likely to lead to relevant evidence concerning the particular
25 presentation by the plaintiffs as a basis for the damages for

1 that particular witness.

2 With respect to the defendants' request to preclude
3 plaintiffs from deposing someone on the factual basis for the
4 defendants' affirmative defense, the defendants have
5 represented that they, in fact, did respond and they did not
6 object and they pointed to documents in their initial
7 disclosures. Is this a factual dispute that I'm going to have
8 to resolve?

9 MR. HILL: I wouldn't think so, Your Honor. We have
10 now produced all of the documents that we would be relying on
11 to make the affirmative defense lack of capacity for both the
12 defendants. I mean, obviously if we locate additional
13 documents or think of additional documents we'll produce them,
14 but we've produced at this point everything that we're going to
15 rely on, including publicly available materials, so I don't
16 think there's any reason at this point to be taking a 30(b)(6)
17 on that subject.

18 And as we suggested in the cases that we've cited,
19 including this one decided by Your Honor, the discovery when I
20 was doing the research, the much less burdensome practice in a
21 situation like this is to have the party answer contention
22 interrogatories so the lawyers can describe what the evidence
23 is and how they'll make the argument as opposed to trying to
24 educate the witness to essentially give the closing argument on
25 behalf of a lawyer.

1 And the other point I would make is that the response
2 by Mr. Schoen indicated that they might not be pursuing this
3 30(b)(6) topic on behalf [indiscernible]. Obviously they're
4 not going to pursue the topic.

5 THE COURT: Well, let --

6 MR. HILL: There's no point in having a ruling at
7 this point, so --

8 THE COURT: Well, let me -- I don't know if they're
9 planning to pursue it, but my ruling on a situation such as
10 this would be that to the extent that you have not identified
11 any evidence either by pointing to it or responding to it,
12 you'd be precluded from presenting such evidence.

13 To the extent that you have responded that you have
14 given all of the evidence and pointed it out to the plaintiffs,
15 then you need not worry.

16 MR. HILL: Your Honor, a point of clarification. I
17 don't at this point have an interrogatory that would require me
18 to point out the specific documents in my production that we
19 rely on. As I've suggested, we're happy to answer such
20 interrogatory or if you want me to informally do that, I'm
21 happy to do that just so there's no question about --

22 THE COURT: I mean --

23 MR. ROCHON: -- a subset of production as pertinent
24 to this issue.

25 THE COURT: Okay. Although I think you said that the

1 information is in your initial disclosures.

2 MR. HILL: In a supplemental production set.

3 THE COURT: Okay. Again, as I said with respect to
4 the discovery as to the plaintiffs, the whole idea is that the
5 party who is seeking information has all the information that's
6 likely to see the light of trial and they can determine whether
7 or not they want to get more documents or if they have all the
8 documents they need, but nobody comes in and discovers new
9 documents without explaining it to the trial judge.

10 MR. HILL: Understood, Your Honor.

11 MR. SCHOEN: May I be heard on this, please?

12 THE COURT: Sure, go ahead.

13 MR. SCHOEN: I'm not sure if we're discussing now
14 both aspects of this, that is, the 30(b)(6). They filed a
15 motion to -- for protective order to preclude a 30(b)(6)
16 witness on the unincorporated association or lack of capacity
17 and we filed a cross-motion or premotion letter compelling
18 discovery -- written discovery -- responses to our written
19 discovery requests on this issue. His answer --

20 THE COURT: Okay. They are -- all right. They are
21 required to respond to your discovery requests, if that's your
22 question.

23 MR. SCHOEN: Well, that's -- yeah, that's part of it,
24 but I think we only discussed half the equation so far. That
25 is, we're not limited, of course, to the documents that the

1 defendants intend to submit in support of their defense. What
2 we've requested are the documents that Judge Daniels told us we
3 should request in engaging discovery on this, the documents
4 that refute the claim that they're an unincorporated
5 association for lack of capacity. Things like lawsuits they
6 brought in their own name, all the things we laid out in our
7 letter.

8 So it's really only -- the idea that -- and I don't
9 suggest the Court raise this idea, but the idea that their
10 obligation is over once they've submitted what they intend to
11 use on their behalf either by way of disclosure or otherwise
12 certainly doesn't answer the question.

13 And in terms of 30(b)(6) witnesses, it may be that we
14 do have to take -- obviously we don't if the Court says we
15 don't, but it may be from our perspective that we do have to
16 take a 30(b)(6) witness's deposition on this issue to flesh out
17 what we get in the written discovery and to examine that
18 witness about what the facts are that that witness claims on
19 behalf of these defendants makes that wit -- these defendants
20 lack the capacity to sue or be sued.

21 THE COURT: Okay. Well, I'm not precluding a
22 30(b)(6) now. I guess we're not sure where you're going to go
23 with that. But as to the specific question of whether or not
24 the plaintiffs are entitled to answer to the question of
25 information or documents which would refute the defendants'

1 position, the defendants are required to answer those
2 questions.

3 MR. HILL: Your Honor, just so I'm clear, at this
4 point there are no questions; there are document requests to
5 which we had lodged objections. The particular document
6 requests that Mr. Schoen is referring to is the request that
7 would literally require the PA to produce every document in
8 every criminal case it's brought in the West Bank or Gaza to
9 the extent it can assess it for the last 12 years. That would
10 be unduly burdensome and frankly a complete waste of time. If
11 the purpose is to establish that the PA brings actions in its
12 own courts that is a fact that is conceded. There would be no
13 point in going through the unduly burdensome exercise of going
14 into every courthouse in the West Bank and every prosecutor's
15 office copying every Arabic language document and every
16 criminal prosecution in the West Bank.

17 MR. SCHOEN: Judge, let me shortcut that, then.
18 We're willing to forego documents regarding criminal
19 prosecution brought in the name of the PA. Let's get the other
20 documents. Let's get documents about lawsuits the PA or the
21 PLO have brought.

22 THE COURT: Where?

23 MR. SCHOEN: In the Palestinian courts in their name,
24 in Israeli courts in their name or have been sued in either of
25 those courts in their name, and any court anyplace because

1 their position is they don't have the -- they lack the capacity
2 to sue or be sued.

3 And as we've discussed with Judge Daniels -- and we
4 may have a disagreement over that -- our position on the law
5 is, one factor to consider is, do they perceive themselves to
6 be able to sue or be sued and have they been recognized as
7 sued -- having the right to sue or be sued.

8 For example, we took the dep -- 30(b)(6) deposition
9 on this question in another case, a case pending in Washington,
10 D.C., and the witness there testified that their cases are --
11 brought in their name are regularly dismissed in the Israeli
12 courts. We believe they're dismissed on standing grounds, not
13 lack of capacity. But there may be papers they filed in those
14 kinds of cases in which they argue that they do have the
15 capacity to be sued or to sue. This is the only way we can get
16 discovery on this.

17 THE COURT: I'm sorry. So the -- in judging the
18 burden versus the benefit, you're not interested in a legal
19 ruling about their capacity; you're interested on whether or
20 not they've represented they had the capacity.

21 MR. SCHOEN: I'm interested also in legal relief.
22 That's not what we've requested. What we've requested are the
23 documents -- we relay that in our thing [ph.], but the
24 documents that are specified in our request, documents which we
25 believe give rise to evidence that they perceive themselves to

1 have the right to sue or be sued, that they have been
2 treated -- or that they have been treated as if they have the
3 right to sue or be sued because they brought those actions or
4 because they made the arguments that they have --

5 THE COURT: But what's your response to the
6 burdensomeness argument?

7 MR. SCHOEN: Well, I would say, let's get started.
8 We don't have any idea about what kind of numbers they're
9 talking about. In terms of the civil actions brought by the
10 PLO, I don't know if there are any. In terms of civil action
11 brought by the PA, on the one hand it may be the position there
12 aren't any; on the other hand, there may be there is a lot.

13 Let's start with a town, for example. Pick a town.
14 We have no reason to believe it's burdensome. He just said why
15 the -- Mr. Hill just said why the production of criminal case
16 documents would be burdensome. I say, let's forego that, but
17 let's have the civil cases where the PA has brought an action
18 or hasn't or make some showing that it's [inaudible] because
19 the number is so great. And if the number is so great of cases
20 which have been brought in the name of the PA or against the PA
21 in the name of the PLO or against the PLO in those capacities,
22 then maybe that's some answer. Maybe that indicates that they
23 have -- maybe that they have the capacity to sue or be sued or
24 that they perceive themselves to, but let's get the numbers or
25 let's get the documents.

1 THE COURT: So what would you have them do in order
2 to get the answer to your question?

3 MR. SCHOEN: Respond to the --

4 THE COURT: No. What would you have them do? How
5 would you suggest they go about doing it?

6 MR. SCHOEN: Well, specifically I would say that they
7 should produce to us for starters a list of case names and
8 courts every case that the PA or the PLO has brought. Again, I
9 don't know that the PLO has ever brought a lawsuit in its name,
10 so we may be talking about frankly nonsense here if there is no
11 such thing. That certainly wouldn't be a burdensome response.
12 I don't know the answer to it. I'm entitled to an answer to
13 it, frankly. And so I think they ought to submit the documents
14 that -- from lawsuits. Like in any case, we ask normally
15 interrogatories or requests for production, give us any lawsuit
16 you have filed in the past.

17 In this case, there's a more specific reason for it.
18 They have taken the affirmative defense that they don't have
19 the capacity to sue or be sued. If they file a lawsuit in
20 their name, then we respectfully submit that would refute that.

21 THE COURT: Hold on a second.

22 [Pause in the proceedings.]

23 Okay. Now, which -- what's the case that you cited
24 that stands for the proposition that their perception of their
25 ability to initiate a lawsuit is a factor to be considered?

1 MR. SCHOEN: I don't know if I did cite a case on
2 that, Your Honor. If they've held themselves out on their
3 papers as having the capacity or sue or be sued that would
4 directly undercut their representation to this Court. Who --
5 by the way, what Judge Daniels said specifically was up until
6 now you all have taken the position that you're a stake [ph.].
7 Are you dropping that today and saying you're an unincorporated
8 association, lack of capacity. They effectively said yes. We
9 said, well, we need to get some discovery on this, then. Said
10 a couple of times. I'm sure Your Honor is aware on that
11 August 14th hearing.

12 So one of the things to consider, you know, we say if
13 in their own jurisdiction there is -- as the Massachusetts case
14 we cited, is there own jurisdiction they -- they're the
15 government. As the government if they give themselves the
16 right to sue or be sued. We say that's an important factor to
17 consider whether they should be treated as having the right
18 capacity to sue or be sued before this Court.

19 Now, they had this thought that we -- you know, we
20 had those legal issues resolved before Judge Daniels with --
21 you know, had a long argument he had over that and he rejected
22 their position at that time subject to taking discovery --
23 rejected the position at that time that they should be
24 dismissed as parties because of their lack of capacity subject
25 to taking your discovery and refile a motion. That's what

1 they --

2 THE COURT: Well, I don't think that ultimately
3 answers the dispute that's here before the Court. I mean,
4 there's discovery and then there's discovery.

5 MR. SCHOEN: Judge, in my view on my issue this is as
6 basic as it gets, lawsuits that they have filed or been for --
7 been sued -- had sued against them.

8 THE COURT: Okay. But if I understand you correctly,
9 you're not limiting it to situations in which they've actually
10 prevailed on their claim that they had capacity sue.

11 MR. SCHOEN: That's right. I wouldn't limit it to
12 that.

13 THE COURT: And why is that?

14 MR. SCHOEN: Because they have argued elsewhere that
15 they have the capacity to sue or be sued. We're entitled to
16 know about those arguments because it directly refutes the
17 position they're taking here and what were the reasons --

18 THE COURT: And --

19 MR. SCHOEN: Sorry.

20 THE COURT: -- it directly refutes it, but -- and
21 therefore what? I mean --

22 MR. SCHOEN: What reasons have they given for why
23 they --

24 THE COURT: I know, but I mean, let's assume they
25 took a -- let's assume that they've been trying to sue and

1 they're being rejected and now they've -- they're here and they
2 say they're unincorporated. The fact that they've taken a
3 different position in other cases, what's the relevance of that
4 here? I mean, aside from it being contradictory what's the
5 legal relevance of it?

6 MR. SCHOEN: I think that makes it legally relevant,
7 that they've argued other facts other places.

8 THE COURT: Under what theory?

9 MR. SCHOEN: I suppose on the same theory that Judge
10 Daniels was interested in --

11 THE COURT: No, no. Now we're on this question of if
12 you take a position that's different, what's the legal
13 significance of that in this case?

14 MR. SCHOEN: Might they be estopped from raising a
15 different position in this case before another court, they've
16 taken that position that they --

17 THE COURT: Estopped?

18 MR. SCHOEN: Yeah. That's a legal relevance.

19 THE COURT: I mean, you think that the -- why would
20 they be estopped in this case? Why would there -- I mean,
21 well, first of all, let -- I mean, if we talk about claim
22 preclusion and issue preclusion as opposed to estopped, which
23 they used to talk about when I was in lawsuit, estoppel used to
24 be issue preclusion. All right. What's the -- what would stop
25 them from changing their position, vis-a-vis you because you

1 weren't in the other lawsuits? So where would estoppel come
2 in?

3 MR. SCHOEN: I think if they made the argument under
4 oath if they had the capacity -- let's say in Israeli courts
5 their lawsuit was dismissed and in responding to the papers it
6 said why those -- the lawsuit ought to be dismissed. They
7 responded as the -- all of the facts and legal bases for why
8 they should have -- why they do have the capacity to sue.
9 That's exactly the kind of thing we talked about on
10 August 14th. We need to know what position are you taking in
11 different places.

12 THE COURT: Yeah, but, you know, if you allege that
13 certain facts create a certain legal conclusion that doesn't
14 bind you from an estoppel point of view.

15 MR. SCHOEN: That's all I have to offer on it, Judge.

16 THE COURT: Oh, okay. But by the same token, what
17 did you want to say, Mr. Hill?

18 MR. HILL: Yes, Your Honor. Let me take us back to
19 sort of first principles if I may and that has to do with
20 choice of law. So this is a federal court; we're governed by
21 the Federal Rules of Civil Procedure. Federal Rule 17, as I'm
22 sure Your Honor knows, says that if you're a corporation or an
23 individual, your ability, your capacity or sue or be sued is
24 determined by either domicile or your place of the corporation.

25 The PA and the PLO are not individuals. The United

1 States Supreme Court held that in the last term. They are
2 neither corporations. They have not been incorporated by any
3 state, local or foreign. So these are, in our view,
4 unincorporated associations.

5 Every court other than Judge Daniels who has
6 considered this issue has held that the PA and the PLO for the
7 purposes of Federal Rule 17 and the rules of service, including
8 the rules of service under which we were served the process in
9 this case, is properly treated as an unincorporated
10 association. Rule 17, as Your Honor knows, says for entities
11 that are not individuals or corporations, their capacity to sue
12 or be sued is determined by the law of the Court, the law of
13 the state in which the court sits. So in this case it's New
14 York State law.

15 So the issue that will ultimately have to be decided
16 by Judge Daniels as to whether or not we have capacity for the
17 non-federal claims in this case because Rule 17 goes on to say,
18 as you know, in the case of an unincorporated association they
19 can be sued as allowed by federal statute. Okay. So we're
20 talking about the pendant claims in this case. Whether or not
21 we have the capacity to be sued will be determined by New York
22 State law.

23 Now, the New York State law says that the
24 corporations you look to the place of incorporation. Well,
25 that doesn't apply here because we're not a corporation. And

1 what the plaintiffs have argued is that because the PA -- and
2 I'm not sure if they're making this point about the PLO or not;
3 let's put that to the side -- has a governing nature. It's a
4 governing entity. They say, well, in that case, if it's a
5 governing entity you look to the place where it was
6 incorporated. Well, the issue here is that the PA is not
7 incorporated anywhere.

8 And so the cases the plaintiffs are citing are
9 completely inapplicable. The cases that are applicable are the
10 ones we cited in my letter, which say that if you have an
11 unincorporated government agency under New York State law it
12 lacks the capacity to sue or be sued.

13 So the discovery the plaintiffs want to take about
14 whether the PA or the PLO has sued or been sued in foreign
15 jurisdictions is completely irrelevant for the following
16 reasons. Number one, the only jurisdiction whose law is
17 relevant is the State of New York. If you want cases where
18 we've been sued in New York, they're publicly available.
19 They've all been in this courthouse, I believe. We have not
20 brought any lawsuits in the state of New York. And that, in
21 our view, is the only discovery that would conceivably be
22 relevant to the issue of whether we have capacity to sue or be
23 sued under New York law because we're not incorporated and
24 we're not individuals.

25 So all this about whether we brought lawsuits in

1 Israel or in our own territories is completely irrelevant, but
2 let's set that aside for a moment. Talking about
3 burdensomeness versus relevance. If the point the plaintiffs
4 desire to make is that the PA has brought lawsuits in its own
5 courts that point is conceded. There is no need for further
6 discovery on it. If the point they want to make is that the
7 PLO has occasionally participated in actions before foreign
8 forum that is also conceded. We cited in my letter and since
9 when the PLO participated before the Court of International
10 Justice of the Hague in an action that the U.N. General
11 Assembly initiated about the wall in the West Bank.

12 So there's no need to go find documents in Palestine
13 or Israel and produce them in response to this discovery
14 request. Is they want to establish that the PA or the PLO has
15 been sued in its own name in a foreign jurisdiction that can be
16 so much more easily accomplished through a request for
17 admission or an interrogatory that poses that question.
18 There's just no reason for us to go search courthouses in the
19 West Bank to produce documents or Jerusalem or Tel Aviv or
20 wherever else in this case. It's a totally unduly burdensome
21 compared to the marginal and I think total irrelevance in the
22 discovery [indiscernible].

23 THE COURT: Well, you sort of glossed over one
24 particular thing and that is that every court except Judge
25 Daniels, but this is Judge Daniels we're talking about.

1 MR. HILL: Of course. And that's why we're having
2 this issue about what the discovery is and what the proper
3 scope is.

4 THE COURT: Well, but once Judge Daniels makes a
5 legal ruling on the issue doesn't that determine the scope of
6 discovery?

7 MR. HILL: All he said is that there needs to be
8 discovery and all Judge Daniels said, in all candor, Your
9 Honor, was that I had to produce what I was going to rely on
10 and I've done that. And that's what they said they were
11 seeking in these discovery requests in their letter to you.
12 They said they wanted us to be required to turn over all the
13 documents we were going to rely on and I have already done
14 that. So in terms of what Judge Daniels ordered, as far as the
15 scope of the discovery he contemplated, we are in total
16 compliance with what he has directed.

17 THE COURT: Okay.

18 MR. HILL: The question now is whether additional
19 discovery beyond what he directed should be allowed.

20 THE COURT: All right. Well, I'll confess that I
21 have not seen the transcript of Judge Daniels' conference with
22 you, even though it goes back to August.

23 MR. HILL: August 9th.

24 THE COURT: So I -- it's certainly -- well, it is my
25 position that to the extent that Judge Daniels makes a legal

1 ruling that circumscribes the scope of discovery unless you get
2 Judge Daniels to change it because, you know, different judges
3 have different views and I don't agree with all of my
4 magistrate judge colleagues. In fact, the District judges
5 don't agree with the Court of Appeals but, you know, there's a
6 pecking order.

7 Do either of you have a copy of Judge -- of the
8 transcript?

9 MR. SCHOEN: I have a copy, Your Honor.

10 THE COURT: I'm not going to read it right now, but
11 I --

12 MR. HILL: I've got copies of it. It's got my
13 highlights on it and notes.

14 THE COURT: Yeah. Well, why don't -- send me a copy.
15 I mean, I just -- I'm not going to try to rush through the
16 ruling. I might even want to discuss with Judge Daniels what
17 he meant when I read what he said.

18 MR. SCHOEN: Judge, I'd like to be clear about one
19 thing. This is like instant replay and it's not appropriate.
20 We had a long argument session fully briefed before Judge
21 Daniels and he rejected the exact argument that this fellow
22 raised the first half of his discussion today and he rejected
23 the cases on which they relied.

24 So we've already been down this road and it's not
25 appropriate to reinitiate that issue here in support of their

1 argument.

2 THE COURT: Well, if, in fact, that's what Judge
3 Daniels did I'll get that when I read it, wouldn't I?

4 MR. SCHOEN: Thank you, Your Honor.

5 MR. HILL: I disagree, but Your Honor will read the
6 transcript.

7 And the point I will make is this. Even if Judge
8 Daniels has disagreed with me about the relevance of discovery
9 beyond lawsuits in New York, even if you think lawsuits outside
10 of New York or even outside the United States aren't relevant,
11 the burdensomeness of the particular discovery that is sought
12 here, which is every document filed in every case initiated by
13 the PA or PLO anywhere in the world obviously outweighs the
14 relevance of what the plaintiffs seek to prove is that we
15 brought lawsuits somewhere else.

16 THE COURT: Well, again, that might mean that we'd
17 have to start taking baby steps, but it does --

18 MR. HILL: All I'm suggesting is that if Your Honor
19 does think that this is relevant discovery that you use your
20 discretion, in fact, what's required by the rule and direct
21 that it be had in a manner that is less burdensome such as an
22 interrogatory or request for admission.

23 THE COURT: Well, I'll figure out how to do it if I
24 so -- and as plaintiffs' counsel points out, you know, to some
25 extent we can't really deal with the burdensome issue of the

1 documents unless we know what we're dealing with in terms of
2 cases. And I mean, I think the likely scenario might be for
3 the defendants to give some idea of the number of cases that
4 we're dealing with.

5 MR. HILL: Just to make my point just clearer, Judge.
6 Is there is one case where the PA or PLO has been a plaintiff
7 and that's a relevant fact. Doing more than producing one case
8 is a waste of time. If the relevant fact is that we've been
9 sued in another forum, doing more than admitting that we've
10 been suing in another forum is a waste of time. If the fact is
11 that we've been sued and we've brought a lawsuit that can be
12 established so much easier than producing foreign language
13 documents from another forum.

14 THE COURT: And what is the benefit of producing more
15 than one, by the way? Even if it's a -- let's say they
16 contradicted themselves and they did it in one case. Why would
17 you need more than one case?

18 MR. SCHOEN: Well, first of all, I suppose to face
19 the argument, which I can guarantee you will come, we did that
20 one time. We did that one time. We've taken another position
21 on different occasions. We need to see what's out there. We
22 need to see how many times they've done it. Again, let's see
23 the numbers.

24 Judge, from our experience over there -- now, I have
25 no -- I really have no firm way of saying, we're aware of two

1 law firms that generally represent the PA or the PLO over
2 there. It's Idelle [Ph.] Freij and the Carnellie Arnon [Ph.]
3 firm. Start with them. I mean, they know these guys very
4 well. They know these lawyers very well.

5 MR. HILL: This just illustrates the point, Judge. I
6 mean, these lawyers are co-counsel with Israeli lawyers who
7 have brought lawsuits against the PA and the PLO in Israel.
8 The co-counsel in Israel for these very plaintiffs are aware of
9 these very lawsuits because they're the ones that brought them.
10 It's a complete waste of time to make us go to Israeli counsel
11 for the defendants, have them photocopy stuff from their files,
12 and give it to these lawyers when their co-counsel in Israel
13 already had it because the co-counsel in Israel initiated those
14 lawsuits.

15 MR. SCHOEN: We don't just take on the word that it's
16 burdensome. Give us the numbers. Give us the numbers as the
17 Court just said.

18 THE COURT: Okay. All right. I'll look at the
19 transcript, first of all. Who's sending me the transcript? Do
20 you have a clean transcript?

21 MR. SCHOEN: I haven't marked on it.

22 THE COURT: Okay. Now, was this -- that's all I had
23 from the prior -- my prior list. Is there something else that
24 was on your list that I may have missed and then we can get to
25 this couple of inches here.

1 Okay. Now, what is it that the plaintiffs have just
2 filed? What do they want? What's this?

3 MR. SCHOEN: I think we filed two things. We filed a
4 premotion letter regarding Ms. Guetta and photographs --
5 request an outstanding --

6 THE COURT: When did you file that? I'm not --

7 MR. SCHOEN: Also yesterday.

8 THE COURT: Okay. That --

9 MR. SCHOEN: I didn't anticipate taking it up with
10 you.

11 THE COURT: No, I just -- it's helpful for me to know
12 what's going on. What's that all about?

13 MR. SCHOEN: That's a request that's been made for
14 photographs. Ms. Guetta was a victim with her family of a
15 shooting attack in an area that was the site of several similar
16 shooting attacks. In order to -- Ms. Guetta testified that the
17 face of the attacker would be something -- I'm paraphrasing --
18 forever embedded in her mind. So we -- she needs to be shown
19 the pictures.

20 What we did was to narrow the field. We going
21 through some research picked out the names of 17 people who are
22 people who operate in this kind of MO in that area during that
23 time period. Many of whom were their employees. Security
24 officers and policemen for the PA at the time. And so in
25 November of last year we served them with requests -- I mean,

1 with -- yes, requests for production asking them for pictures
2 of 15 people. In December we added two people to that. And
3 what we say in our letter is, we were able to find on our own
4 the picture of one of the people and we showed it to the lady
5 and she wasn't able to identify that person.

6 So we've asked for pictures of these now it would be
7 16 people. Again, what we say in our letter is if they have a
8 PA ID or to the extent they were policemen they would have a
9 photo with the PA. And the answer we got was pages of
10 objections. These are attached to the -- pages of objections,
11 general objections and that sort of thing, and then
12 specifically as to this, this was a -- I think one request,
13 request for production. After that, other objections like it
14 would be too burdensome --

15 THE COURT: So what do you --

16 MR. SCHOEN: -- [indiscernible] --

17 THE COURT: What do you want to do with the pictures?
18 But what do you want --

19 MR. SCHOEN: [Indiscernible] the lady, can she
20 identify these people, any one of them as the shooter and with
21 his face that was forever embedded in her mind.

22 THE COURT: Okay. Well, okay. Let me tell you a
23 little anecdote. I mean, I don't know if any of you follow the
24 capital punishment area.

25 MR. SCHOEN: I've practiced in that.

1 THE COURT: Okay. You -- there was a woman who was
2 the victim of a violent rape who was -- whose testimony in
3 opposition to capital punishment was, when she knew it was
4 going to -- you know, she couldn't defend herself she made a
5 point of remembering the face of that person. She identified
6 the person, he gets convicted. Turns out it was the wrong
7 person.

8 What -- the fact that somebody says it's indelibly
9 marked, what do you think it -- from a psychological point of
10 view, why should I even consider that to be admissible
11 evidence? I mean, I -- and I know other situations where
12 people say, you know, "I'll never forget the face" and
13 eyewitness identification has been time and again proven to be
14 reliable.

15 MR. SCHOEN: And time and again people have been
16 convicted on it.

17 THE COURT: Right.

18 MR. SCHOEN: [Indiscernible] know the circumstances.
19 This isn't a trial of visibility issue here, Judge; this is a
20 discovery issue.

21 THE COURT: And so what do you -- so what -- I'm
22 saying, what do you want to get from this? So let us say she
23 identifies one of the people. Then what?

24 MR. SCHOEN: Then maybe we can show something more
25 about that person, where he was at that time. I don't know.

1 That he committed X number of similar shooting incidents, that
2 he told somebody he was involved in the shooting incident.
3 Lots of things could come up that would be admissible evidence
4 and useful evidence from that.

5 The alternative is not to show a picture of who
6 potentially could be the shooter if they have pictures of
7 people who potentially could be the shooter and then she's out
8 of court because -- and she really could identify the person?
9 How could that possibly be fair? Maybe her identification is a
10 reliable one.

11 MR. HILL: Well, Your Honor --

12 THE COURT: I don't expect you to give me full
13 arguments because I actually haven't seen the papers yet,
14 but --

15 MR. HILL: Yeah, so a couple initial points. One,
16 these requests were served a year ago. We served our
17 objections a year ago. This is monumentally stale to be
18 brought to Your Honor's attention now. This has been sitting
19 out there undiscussed for I think literally a year. And if
20 this is discovery they wanted to pursue they should have
21 brought this to you a long time ago. We were first before you
22 in June. Mr. Schoen and I were here and we made the point
23 that, you know, we need to have meet and confers. We had a
24 meet and confer about this. We said we weren't going to
25 produce this stuff for the reasons stated in our objections

1 which included among other things the reliability point Your
2 Honor has just articulated here. And they have just slept on
3 this and now that we're a month out of discovery they're
4 seeking to compel. So that's an independent reason to deny
5 this aside from the merits.

6 I'm not going to address the reliability point but I
7 will make this point. This evidence could only be used to try
8 and establish the very sort of unreliable testimony that you
9 have just articulated. Think about it. They have given us a
10 list of people. Now, we sent discovery to them and said, give
11 us all the documents you have on these people because we wanted
12 to see if any of these people were actually implicated in any
13 evidence, admissible or not, of having any involvement in the
14 shooting of the Guettas. They sent us some stuff. They have
15 not one shred of evidence. They don't even have a newspaper
16 article linking any of these people to the shooting. There is
17 no evidence at all that these people have anything to do with
18 this shooting. And tellingly, the person whose photo that they
19 showed to this witness because she said, that's not the guy,
20 that's the person they named in their complaint. There's one
21 name in the complaint. It's this guy that their witness has
22 now permanently excluded as being the shooter.

23 So this is an extraordinary fishing expedition. And
24 once more, it's a fishing expedition where all the fish are
25 designed to make my clients liable. They've come up with a

1 list and they now want to show her people any one of which they
2 will then argue makes us liable in this case. That testimony
3 could not be admissible for the reasons that you've stated.

4 Now, Mr. Schoen said, "Maybe if she picks somebody we
5 can do further discovery about that person." That doesn't
6 hunt. They can already do discovery about these people. In
7 fact, they have every incentive to do discovery if they
8 actually think these people had something to do with it. This
9 is clearly an attempt for them to put in front of this woman 12
10 years out of [indiscernible] a photo array of people, any one
11 of which is a good choice from their perspective because it
12 will be viability. And did we mention that the witness who is
13 making the ID is financially interested in picking one of these
14 people as are he shooter.

15 Twelve years after she saw someone through a car
16 window for a split second who was shooting at her, there's no
17 way that that could be sufficiently reliable testimony and
18 that's the only admissible evidence that could conceivably come
19 out of this document request setting aside the issue of whether
20 we have to toss every office in the West Bank trying to find
21 pictures of these people, most of whom aren't even fully
22 identified.

23 In order to find things in the West Bank for people
24 you need to have either an ID number or all four of their names
25 and in many of these instances we have neither. This is a

1 tremendously unduly burdensome, irrelevant fishing expedition.

2 THE COURT: Well, I'll -- let me --

3 MR. HILL: And you ought to deny it.

4 THE COURT: Let me see it first before -- I'll see
5 what you say in your -- I assume there's an affidavit from this
6 person in there somewhere.

7 MR. SCHOEN: I believe there's an affidavit, Judge.
8 There's testimony that she gave in June of this year.

9 MR. HILL: Right. And let me make this point.
10 Closer to the event when she was previously deposed in the
11 other lawsuit that she brought against the Arab Bank [Ph.] for
12 these same damages for these same injuries, she said she
13 couldn't identify the person. In fact, she couldn't even tell
14 whether they were an Arab or an Israeli.

15 MR. SOLOMON: And Your Honor, that's a
16 misrepresentation. I think he's stretching her prior
17 testimony. There was minimal testimony to that point in any
18 event. I mean, I don't have the transcript with me, but if
19 that's something Your Honor would like to see, we can certainly
20 [indiscernible] --

21 THE COURT: And what -- and what about the question
22 of -- I mean, there -- I know you weren't here from the
23 beginning, but there have been a number of times when I have
24 said, okay, we've got to come to a point where I know what's
25 going to be the end point. What are the issues that you want

1 me to decide? Why is this issue now coming up and why wasn't
2 it brought up sooner?

3 MR. SCHOEN: First of all, Judge, she was just
4 deposed in June. Secondly, the whole point of this is to try
5 to work out things without having to come to Court and now
6 we're hearing from them --

7 THE COURT: That's -- okay, that's not going to make
8 that.

9 MR. SCHOEN: We had a [indiscernible] --

10 THE COURT: Okay. Understand. I think you're
11 missing the predicate to what I said. We've had a number of
12 situations, a number of conferences in which I said, okay, we
13 want to make sure all of the issues are on the table. Okay.
14 So the only question I'm asking you is this. Why wasn't it
15 brought sooner? If you say it was -- and so I'm looking for
16 temporal issues. You said she was only deposed in June.

17 MR. HILL: End of June, Your Honor.

18 THE COURT: All right. Although that may not answer
19 the question of why this was not an issue because we are
20 talking about identifying somebody for the purpose of, you
21 know, proceeding in the lawsuit. It seems to me this is not
22 necessarily an issue that only would have come up after the
23 deposition.

24 MR. SCHOEN: Well, I --

25 THE COURT: Well, think about it because, as I said,

1 I haven't seen the papers. I haven't seen any response from
2 the defendants, but I'll be looking for something which says
3 that -- I mean, aside from the -- I mean, we have some legal
4 issues, some practical issues, and then we have -- you know,
5 even if we're going to be extending discovery, we're not
6 extending discovery for the purpose of opening up everything up
7 for new stuff. We're -- if we extend discovery in this case
8 it's for the purpose of finishing stuff that started, so I
9 don't want anybody to be under the misconception that, you
10 know, if I grant you any extensions of discovery then all of a
11 sudden somebody is going to file some new discovery request.
12 This is all cleanup at this point.

13 What's this one about, Mr. Schoen?

14 MR. SCHOEN: This one is what we hope to be a
15 comprehensive rendition, Judge, of the pattern of discovery
16 violations that we faced in this case that require the schedule
17 to be extended.

18 Besides all of the things -- we try to list them in
19 sort of painstaking detail, Judge. We break them down by
20 victim and relevant outstanding requests to them that have been
21 met with things like, well, we're still looking, we will
22 investigate, getting things in dribs and drabs, things that
23 they clearly should have had years ago for the reasons that we
24 state in our papers.

25 Beyond that, Judge, one specific issue is that there

1 have been several Hague Convention deposition requests that
2 were fully briefed as of April. They deposed the deposition
3 requests and we represented to the Court that in similar
4 situations elsewhere we've been able to get those depositions
5 taken within three months of the order granting those
6 depositions.

7 As I say, that's one of the issues. Besides --

8 THE COURT: When you say "similar situations," what
9 do you mean?

10 MR. SCHOEN: Other cases.

11 THE COURT: Well, what -- no. When you say
12 "similar," other cases doesn't tell me similar to this sit --

13 MR. SCHOEN: Wanting to take depositions in the
14 places where these depositions are sought of people similarly
15 situated to these kinds of people.

16 THE COURT: You mean, PLO/PA kind of people?

17 MR. SCHOEN: Yes, Your Honor.

18 THE COURT: Is that --

19 MR. SCHOEN: Yes, Your Honor. That's my
20 understanding of what's meant by it.

21 THE COURT: Okay. I just wanted to make sure. You
22 know, I'm not sure what the lawyers think are similar. I just
23 want to -- I don't want to be assuming.

24 MR. SCHOEN: I understand. It's all in the briefing
25 papers as I understand it also, Judge.

1 THE COURT: Okay.

2 MR. SCHOEN: That's one specific issue. Again, well,
3 they've said they want to discuss it today. I also --

4 THE COURT: So what's the bottom line? What are you
5 seeking? You want an extension of the discovery deadline?

6 MR. SCHOEN: Yes, the extension -- an extension of
7 discovery deadline, Your Honor.

8 THE COURT: And what else?

9 MR. SCHOEN: What we say in here, Judge, is that the
10 Court carefully considers, as we know it will, the nature of
11 the kinds of violations here that this court thinks is
12 appropriate, that we should have a special master appointed
13 here to consider exactly what kinds of responses we're getting
14 and what they mean when they say they're investigating or
15 they're going to ask another office about it. And, again, the
16 examples are given here of documents that clearly would have
17 been known, should have been known, and were known to them long
18 ago. It's this pattern of dragging it out until the end and
19 then say, well, why didn't you raise it earlier.

20 THE COURT: Can you --

21 MR. SCHOEN: Well, we raised it all along.

22 THE COURT: Can you give me a specific example of
23 such a document?

24 [Pause in the proceedings.]

25 MR. SCHOEN: If Your Honor has the document there,

1 I'm just going to give -- I'm picking a random example here.
2 Page 5 of the declaration, paragraph (g), it's the kind of
3 document --

4 THE COURT: Okay. What's -- the declaration is --

5 MR. SCHOEN: It's 269 -- D.E. 269.

6 THE COURT: Okay. Declaration. It's a --

7 MR. SCHOEN: And I'm picking a random example. This
8 is the pattern --

9 THE COURT: This is the Tolchin declaration?

10 MR. SOLOMON: Yes.

11 MR. SOLOMON: Tolchin declaration.

12 MR. SOLOMON: Yes.

13 THE COURT: Okay. And what are you pointing to?

14 MR. SCHOEN: For example, paragraph -- if you take
15 paragraph (f), which starts on page 4, this is the kind of
16 document I was saying before they clearly should have had
17 earlier. No reason they couldn't have had it. Then the next
18 paragraph is a different kind of problem we identified here.
19 They are only producing documents who they think will help
20 them, but obviously -- maybe (e) even gives a better example.
21 The document was marked with an earlier date when we got it.
22 Why do they hold these documents so long before producing them
23 after they've located them? That kind of --

24 THE COURT: When you say "so long," I mean, at one
25 point -- I mean, are you talking about weeks, months?

1 MR. SCHOEN: In many cases -- that's for
2 [indiscernible]. Judge, we lay out dates all through the
3 motion papers.

4 THE COURT: And how many examples do you have here?

5 MR. SCHOEN: I don't know the answer to that, Judge.

6 THE COURT: I mean, is it like 10, 20?

7 MR. SCHOEN: Judge, I also have -- this isn't your
8 problem at all -- the Court's problem at all. I also have
9 papers [indiscernible] since I really can't answer those
10 questions specifically right now. I can look through the
11 documents with the Court's indulgence, Your Honor.

12 THE COURT: Okay. Just --

13 MR. SCHOEN: Given [indiscernible] --

14 THE COURT: But let me just paint a picture for you
15 so you understand where I'm coming from on this.

16 Okay. There's been a lot of claims on both sides
17 about the inability to answer questions. If you think that the
18 defendants have been stalling and not producing things when
19 they should have and the reason that you've done it is, like
20 you'll say, there's a date on this and clearly they could have
21 done this or some other date -- or they could have done this at
22 some earlier date, when they give me a response and they point
23 to three or -- a couple -- three or four of them and they have
24 an explanation for them, this is over. You understand what I'm
25 saying?

1 MR. SCHOEN: I think I understand what Your Honor is
2 saying. Let me say this.

3 THE COURT: Because, you know, the problem is is that
4 you -- what you want is just the pattern and practice of the
5 defendants doing something based upon your supposition of why
6 they could have done something earlier. You know, I mean, and
7 the reality is is that, you know, people could ask me why I
8 don't do opinions earlier. And, you know, the -- when I was on
9 your side I used to wonder why judges couldn't do opinions
10 earlier. But, you know -- but I used to do discovery and, you
11 know, people would -- you know, there are reasons that it
12 happened and the more documents and the more trans-national it
13 is the more difficult it is, you know, lawyers are doing
14 things.

15 If they have legitimate explanations for some of
16 these things, it undermines your notion that there's a pattern
17 and practice. You understand?

18 MR. SCHOEN: Let's see the response, Judge. And
19 let's see the response because what the nature and tone of this
20 document is that they've been simply stringing us along all of
21 this time, so we wait and we don't file a motion to compel
22 because they're investigating or they're going to get it. And
23 as we point out here, these are documents that if they turn up
24 turn up as documents. There's no reason they required any
25 further --

1 THE COURT: And let me ask you this.

2 MR. SCHOEN: -- investigation [indiscernible].

3 THE COURT: And although I haven't looked at what
4 you've submitted are you telling me that when you got these
5 documents that were belated you looked at them and said, wow,
6 no wonder they were holding these back.

7 MR. SCHOEN: On occasion. There have been emails
8 that said that kind of thing, how is it you're just --

9 THE COURT: No, I'm just asking because -- I mean, I
10 have cases in which I'll have someone who will say to me,
11 Judge, you know, they were holding this back. And then I look
12 at it and says, why would they hold this back. So I -- there
13 are any number of things which I expect will be at play in this
14 but I guess you just got this anyway.

15 MR. ROCHON: Well, we did, Your Honor. Mark Rochon
16 on behalf of the defendants. It's a bit of a frustrating
17 situation, Your Honor, and if you'll indulge me for a second.
18 First of all, counsel keeps on saying that I'm familiar with
19 the papers. Lead counsel is here. They filed -- in my view,
20 he filed. His name is on it, papers accusing either us, our
21 clients or both of obstruction. And he's not prepared to talk
22 about them. His name is on them. He signed them and submitted
23 it to you essentially minutes before we're in court today.

24 Frankly, I think that's a pretty serious allegation
25 that he ought not to have signed off on it if he hasn't even

1 read it, as he just admitted.

2 MR. SCHOEN: I've read it. I'm not admitting I
3 didn't read it. I've read it.

4 MR. ROCHON: Well, he said he just got it.

5 MR. SCHOEN: That's right. I just got the papers.
6 I've read it.

7 THE COURT: Okay. Counsel, all right. Before you
8 continue.

9 MR. SCHOEN: Yes.

10 THE COURT: Mr. Schoen, I don't allow lawyers to get
11 up and address the other lawyer just because they think they're
12 saying something wrong. If you do that again, then I'm going
13 to ask you to explain yourself and then we will be talking
14 about sanctions. Okay. I don't need cross-talk from the
15 lawyers. You'll get an opportunity to speak. And the fact of
16 the matter is, is that this is just argument. You know, I'm
17 not making a ruling based on anything that counsel is saying.
18 I trust that you all know this that no matter how persuasive
19 you are, if I'm going to make a decision it's going to be based
20 on something that's sworn as an affidavit or an affirmation.

21 The lawyer's representations here are not dispositive
22 and the fact -- and the other fact of the matter is, I hear
23 what's being said. If his characterization of what you said is
24 going to -- is inaccurate, then it's inaccurate but lawyers do
25 that. They mishear each other, but I'm not going to base any

1 decision on it.

2 MR. ROCHON: I'll continue. Your Honor, the reason
3 that we're a little frustrated is we decided the last time that
4 this -- that -- so we were told in mid-October -- the discovery
5 ended December 1st. Mid-October we started to get a series of
6 emails from plaintiffs telling us to keep our calendars wide
7 open November 1st to 21st, going to have all these depositions.
8 And we said, "Well, tell us when, tell us who, give us some
9 notice." The emails are attached to Mr. Hill's letter that's
10 dated October 26, 2012 that you have. And there's a backup --
11 it continues to October 18 insisting we keep the month of
12 November wide open. I -- this isn't my only case or client. I
13 move things. I reschedule things. They're insisting that we
14 have to keep that whole time period open, which makes sense
15 since we're about near the end of discovery and they've taken
16 two depositions in this entire case. They never notice
17 anything.

18 We come to you today and essentially the night before
19 the hearing with discovery to end in 30 days. They filed this
20 seeking a general extension of discovery without any dates in
21 the expectation we point out that a responsible jurist won't
22 want to rule on that and just have it dropped on you. And
23 it's -- for the record with attachments it's at least two
24 inches or more thick. I don't want to overstate it. It's
25 thick. It's a lot of papers with an extensive declaration

1 putting you in a position, I would suggest, that unless you
2 rule on the procedural defects with it immediately, which I
3 think perhaps, Judge, can be a risky thing to do if you don't
4 have a chance to review it, they will criticize you simply for
5 ruling promptly.

6 So the Court is stuck we think unfairly. The Court
7 is capable of defending itself if the Court feels it's been
8 treated unfairly, but we are treated unfairly by this because
9 it's essentially amounts to a *de facto* extension of discovery.
10 If you take the time that is necessary to rule on this, then
11 they're not going to try to do any depositions in the meantime,
12 apparently. And then they'll come and it's like a game of
13 chicken and expect, well, there's no way if the Court would
14 just not allow us any depositions 30(b)(6) and so it's a
15 gamesmanship that we find problematic.

16 THE COURT: Okay. Well, let me be clear. If, in
17 fact, somebody is not scheduling discovery in a hope that we'll
18 have an extension, that's not going to work. Let me -- I'll
19 reiterate what I said before. We don't -- I don't give general
20 extensions. I give extensions for you to complete what you
21 tried to do during a period of the discovery and were unable to
22 complete. So that, for example, you can complete a deposition
23 for which somebody was unavailable during the discovery period
24 and you have to do it afterwards, but you can't for the first
25 time try to schedule it and say, okay, we have a week left and

1 we tried to schedule them for November 28th and they weren't
2 available. That doesn't work.

3 And by the same token, you'll have to show that you
4 tried to schedule it during the discovery period before you'll
5 get to do it after the discovery period. There won't be any
6 new things happening. I hope you all understand that.

7 MR. ROCHON: We do. The defendants definitely
8 understand that it's the point that I'm --

9 THE COURT: Okay. Well, we're all on notice now that
10 there will -- if you -- if there are any depositions that you
11 want to take -- first of all, it seems to me as *prima facie*
12 that before you ask for an extension you have to show that you
13 tried to do the discovery during the discovery period and when
14 they were unable to do it if you never tried to schedule
15 anything that's not going to work.

16 MR. SCHOEN: May I respond to that, Judge?

17 THE COURT: To me?

18 MR. SCHOEN: Yes, Your Honor.

19 THE COURT: You could. It won't change my mind.

20 MR. SCHOEN: Okay. Your Honor, to be clear, though,
21 about the facts we -- all that's described in this document is
22 outstanding discovery requests in which we say we've been
23 strung along.

24 With respect to the depositions we've attached as
25 Exhibit CC relevant -- the relevant exchange on this. We sent

1 them notice ahead of time that we would like to take the
2 30(b)(6) depositions in November. I'm referring the Court now
3 to page 32 of the declaration, paragraph 19. And over the next
4 couple of weeks they were sent topics for the depositions.
5 They took the position -- defendants took the position -- and
6 this is either borne out in the attachment or it's not --
7 defendants took the position that they would not make a witness
8 available on any given date until they had a complete list of
9 all subjects of the 30(b)(6) topics.

10 MR. ROCHON: That's not -- well, obviously you're
11 going to read this. Here's what we said. What was said was,
12 we want to know all the topics before we designate our
13 witnesses and who we're going to use. If they had 40 topics
14 and one witness could address 15, we used that witness. If
15 there's topics that aren't there, you might use a different
16 witness. You don't know who you're going to designate or use
17 as a witness until you get your 30(b)(6) notice.

18 We gave them the only dates that we were blocked out
19 for November and encouraged them to get us the notice as soon
20 as possible. The email chain question is attached to our
21 letter to you dated October 26th. They never sent us any
22 notices, is the bottom line for any dates in November, even
23 though we gave them a wide array of dates of availability and
24 asked them who they wanted to depose.

25 They also said they wanted to depose non-30(b)(6)

1 witnesses. They never sent any notices for those or told us
2 the names of those people. They said they wanted to depose
3 some foundational witnesses. They never sent us those notices.
4 That's fine. If they don't want to take discovery, fine. What
5 we don't want to have happen is to have them blame us for their
6 failure to do their discovery.

7 THE COURT: Well, let me say this about 30(b)(6)
8 witnesses. I think it's a good practice if you're going to do
9 30(b)(6) you do it in a unified notice so that we don't have a
10 situation, for example, where -- as counsel describes where you
11 give them 15 topics and then you give them 15 more and it turns
12 out that the 15 more would have been the same witness. That
13 would not be a very efficient thing to do.

14 By the same token, if the 15 more would have meant
15 another witness would have been more appropriate, this just
16 creates problems at the end. I don't know if this is happening
17 but, you know, the net result for me is that if you've not been
18 efficient in your 30(b)(6) then the burden is on the people --
19 person trying to do the 30(b)(6) then you may be precluded from
20 doing any more than the one that you've noticed timely and
21 that's just a fact of the matter.

22 MR. ROCHON: Your Honor, I know that we're not going
23 to be able to argue the full motion today, but even looking at
24 what they directed you and because we'll respond in writing and
25 you'll rule -- even when you look at what they directed to you

1 today they're complaining about discovery that they say is so
2 late and is so prejudiced on the very page they're looking at,
3 they say that three months after initial production on
4 March 16, 2012, we supplemented our production. They keep on
5 claiming that we're -- our representation that we're continuing
6 to investigate is bad. We understand the Federal Rules to
7 require us to continue to investigate so that if we discover
8 additional responsive documents we produce them. If they want
9 us to stop investigating, fine. But then they complain that we
10 haven't found something.

11 In any event, we found something and sent it to them
12 March 16, 2012. Eight months ago. Now they're here saying
13 they need a discovery extension because of that. I think
14 sometime in the 240 days since they got it they could have
15 shown up here. We didn't meet and confer on this. This just
16 popped into my email last night while I was eating pizza with
17 my kids before coming up here. This is an effort to extend
18 discovery without giving you a chance to rule on it.

19 Here's what we're concerned is going to happen next.
20 We've got a lot to say about this motion. Won't give it all to
21 you today because we'll respond in writing. The Court has
22 already told them not -- don't rely on getting an extension.
23 If there is an extension it will be for already initiated
24 discovery. Parties understand your admonition in that regard,
25 so I'm going to walk out of here and I'm going to get some kind

1 of deposition notices because they probably anticipated that
2 the Court would fall for this. And they're going to be over
3 broad or have problems.

4 I'd ask you to schedule a telephonic hearing for
5 Monday in this case so that if they serve us with those notices
6 we can already be on your calendar to discuss them because
7 we -- there are other cases between the parties. In the
8 Schatski [Ph.] litigation in D.C. they tried to extend
9 discovery and not take depositions. Judge Leon said, "Order
10 them to do the depositions." It was the last month of
11 discovery. There was a lot of fighting between the parties,
12 but the second he set a schedule then we got all the notices
13 and then we did the depositions on short notice and there
14 wasn't an ability to engage with the Court promptly to deal
15 with issues.

16 This is a case in which I would ask the Court to
17 consider setting now a telephonic conference for early next
18 week unless they say they're not going to serve us with some
19 notices in the meantime, but they now have to. And so I don't
20 want to have haphazard sort of situation here. I think it
21 makes sense --

22 THE COURT: Well, assuming that they did serve you,
23 what makes you think that we'd be in a position to have you to
24 make a presentation to me that would be helpful?

25 MR. ROCHON: Even if you weren't able to rule

1 clear -- you might be able to provide guidance. They may
2 notice people that we don't have the ability to produce.
3 They -- for instance, they talk about Mr. Delaunt [Ph.] in
4 their papers here a bunch. Mr. Delaunt doesn't work for the PA
5 but they complain a lot about our production of discovery as to
6 him.

7 I don't know what they're going to do. So far we
8 don't have any deposition notices even though we're 30 days out
9 and they've conducted two depositions. And I know they plan on
10 doing more because they have no case currently so they're going
11 to try to get one through their depositions. So that's where
12 we seek to -- we ask the Court to consider that. If you don't,
13 it's fine. We'll deal with what we get when we get it in the
14 normal course. It's a request. Obviously it's at your
15 discretion as to whether to schedule such a hearing. I think
16 it might be advisable.

17 The only other thing we'd like to state today is on
18 the letter -- this other letter they sent, you know, our client
19 has been dragged into the United States District Court for the
20 Southern District of New York. The plaintiffs' claim that
21 Ms. Guetta was shot by a name called Palowa [Ph.]. She
22 testified at the Arab Bank litigation well over a year ago she
23 couldn't identify anyone in that incident from ten years ago.
24 She now has excluded Palowa. And why we've been brought into
25 court -- that's all they had in this case. There's nothing

1 else to connect the PA to that incident. We've been dragged
2 into court. We've been running around trying to defend that,
3 responding to discovery requests in the Guetta case, conducted
4 damages discovery over when it turns out they have nothing.
5 And that costs a lot of time and money and distraction for a
6 government that is frankly under a lot of other stressors as
7 well. And we think that the admission -- the frank admission
8 in their letter -- you'll see it when you read it, Judge --
9 that they don't have a case unless she picks somebody that they
10 can tie to the PA. Suggest that should never have been here at
11 all.

12 That is -- you know, I realize I just come here as a
13 litigant, but representing a quasi-government and being dragged
14 over here against its will to defend these cases frankly I
15 think the Palestinian Authority can expect a little bit more
16 and we're frustrated by that. We're frustrated by the effort
17 to get this extension of discovery because it costs our client
18 a huge amount to defend this case.

19 THE COURT: Okay. Counsel, I'm sorry that your --
20 the pizza with your kids was disturbed. That's probably caused
21 me the most angst of anything that you said, but as I said, I
22 have not seen the papers. I think it's pretty clear that I
23 have some concerns about an eyewitness identification
24 particularly in the circumstances since the lawsuit was already
25 filed. And I -- so that you're not blindsided, one of the

1 things that whirls through my mind is, how is it that we had a
2 misidentification in the beginning. So if you haven't
3 addressed that, you should be prepared to address it at some
4 time.

5 MR. SCHOEN: I'll address it, Judge. I think it's
6 somewhat related to the self-righteousness I'm hearing. The
7 reason the PA isn't being treated unfairly is because the PA
8 was one after another after another employee standing out a
9 police officer who is a terrorist murderer. That's why they're
10 not being treated unfairly. Any idea, Judge, how many attacks
11 have been made by their policemen and we took a deposition on
12 that. You know why, Judge? Because their theory was, well, if
13 we take people who have been convicted of terrorism or been in
14 prison and we make them policemen maybe we'll rehabilitate
15 them. Smart. Give them guns so they can shoot and kill
16 people, innocent people.

17 And it's also reckless talk. The lawyer just
18 represented to Your Honor, because I'm sure he's sure Your
19 Honor won't check, that in the case in Washington, the judge
20 finally made us have depositions that they wanted to have.
21 They moved to extend the depositions. We noticed them from
22 August --

23 THE COURT: Okay. Counsel, let me stop you for a
24 moment. First of all -- and I don't want to have to repeat
25 myself on this -- it really doesn't matter what he represented

1 about the case in Washington. I'm not making any decision
2 based on it. I actually have the ability to have lawyers talk
3 in front of me and not think that what comes from their mouths
4 is the law.

5 I mean, if I thought what lawyers said about their
6 cases, their prior cases, case they've been in was absolutely
7 factual, my head would explode. I don't know if what that --
8 if what happened in that other case was important to me, either
9 he'd have to tell me or I'd have to look it up. You think that
10 I could exist in this job going by representations from
11 lawyers? That's just a non-issue.

12 But the question I ask you and -- you know, and look.
13 Frankly, guys, if you think that somehow anything that any of
14 you says will have some emotional pull to me, you can forget
15 that too. I am totally unimpressed by the emotional plays from
16 either side. I am dispassionate. You know, whether or not,
17 you know, they're murderers or killers and whether or not
18 they're -- you know, they're being dragged in or not, that's
19 not a legal issue to me. Okay.

20 So, you know, you're not going to get my soul or my
21 heart. You know, I'm just interested in facts and the law.
22 And the only thing I asked you about was, how did this person
23 get in the lawsuit in the beginning and I said I was interested
24 in that. All this other stuff is rhetoric. Is -- I mean, it's
25 not related to the claims in the case. Okay. You know, you

1 just can't sway me that way.

2 You can talk to people who know me. This just does
3 not -- all I hear is, you know, if -- it's like I remember a
4 cartoon. It was about owners and dogs and it says, what the
5 owner says and the owner says, you know, "Ralph, come here."
6 And it says what Ralph hears and it's blah, blah, blah, blah,
7 blah, blah. You know, a lot of what lawyers says, you know,
8 it's bouncing off of me, you know.

9 The reality is, and I will reiterate this for -- I
10 mean, you know, we're near the end of discovery -- I'm not
11 going to base any of my legal rulings on anything that you say
12 unless it's backed up by something other than representation by
13 lawyers. And you're not going to sway me by painting the other
14 side as bad, evil or whatever it is. Indeed, I'm not even sure
15 that you can even trust lawyers when they say stuff. So, you
16 know, I feel your pain as lawyers but, you know, if you don't
17 have anything that's legal, you know, you can just can it.

18 MR. ROCHON: Your Honor, I accept the admonition. I
19 would like to address, therefore, factual and legal issues as
20 to this most recent extension of discovery requests. And when
21 the Court looks at it, what the Court will see we feel is that
22 in each instance they complain about the fact that our
23 production has continued after the initial request, which is
24 our obligation. Any documents that were produced after the
25 initial production were produced many months ago in sufficient

1 time for them to take whatever discovery they wished to in
2 response to that.

3 In several instances we've provided them with
4 initially exactly what they looked for. For example, in the
5 page they directed you to specifically in the declaration on
6 page 5 they're talking about the employment of two Palestinian
7 men who are alleged to be involved in one of the incidents,
8 Hashaika and Abdel Karim Aweis.

9 Within a very short period of time after their
10 initial request, we provided documents that showed that
11 Hashaika had been a Palestinian police officer and Abdel Karim
12 Aweis receives payments pursuant to a government job. We later
13 supplemented that discovery.

14 But the fact is that what they really wanted and it's
15 what they argue is relevant is evidence showing an employment
16 relationship with the PA. They got that extremely promptly.
17 Any supplemental information never changed that status except
18 for it turned out Hashaika had been terminated from his
19 employment a month before the incident and we produced a
20 document that showed his termination. That document showing
21 his termination was produced on March 16, 2012 according to
22 their representation on page 5 of their motion. March 15, 2012
23 was eight months ago. They haven't complained about that since
24 in any regard to somehow affecting their case. They haven't
25 brought that to your attention.

1 I mention this be -- and you'll see that throughout.
2 That's one example. I could give others. They complain that
3 in October 3rd they provided -- they made discovery requests --

4 THE COURT: October of 2011.

5 MR. ROCHON: Excuse me, yes. Seeking identities and
6 employment details with people of knowledge of the gentleman's
7 detention and interrogation by the PA, this gentleman Hashaika.
8 We haven't found any such information. We're sorry. We don't
9 have it.

10 MR. HILL: Actually, we have disclosed that.

11 MR. ROCHON: Eventually we disclosed in response to
12 [indiscernible] name of the man who had information, a man
13 named Dwykats [Ph.]. We disclosed that April 29, 2012, a PA
14 person from April 29, 2012. They didn't seek that position of
15 the man.

16 Now they come -- and so I know we don't have time
17 today to go through all of this, Judge --

18 THE COURT: Okay. And you're right. And -- but
19 that's the kind of thing that I will be looking for, although I
20 think the plaintiffs' representation wasn't simply that you
21 were continuing to produce things, but that you were delaying
22 producing things, which is slightly different.

23 I mean, I understand that you guys differ on it, but
24 I understood them that -- the part that I read.

25 MR. SCHOEN: Judge, I can confirm that. We're not

1 complaining that they're following the rules by
2 [indiscernible] --

3 THE COURT: Right.

4 MR. SCHOEN: -- discussing it.

5 MR. ROCHON: I just want to kind of finish the
6 argument and then I'll sit down.

7 THE COURT: Okay.

8 MR. ROCHON: So I understand that. The only thing we
9 would ask the Court to consider is so these cases happened in
10 2001, '02 and '03, the incidents and maybe one that stretched
11 into 2004. And we'll detail this in our opposition, but the
12 Court should recognize this isn't political talk meant to raise
13 the temperature. There's no question that we represent a
14 territory that is occupied. Israel -- that's not a political
15 point. Israel described itself as occupying the Palestinian
16 territory. There's no question that Israel in connection with
17 their concerns about alleged act of terror -- and I'm not
18 politicizing this -- have incursions where they deliberately
19 destroyed substantial infrastructure. The political part is
20 whether it was justified; the fact of it is proclaimed by both
21 sides.

22 It is difficult for us often to find the kind of
23 documentation that the plaintiffs expect under the
24 circumstances that existed then. The Court sees it today in
25 the news. You'll see there's reports about bombing certain

1 administrative offices in Gaza. The fact it's happening is
2 real. It's political whether it's justified. I'm not trying
3 to politicize this case or this issue. The fact of deliberate
4 destruction of the administration infrastructure of our
5 client's security, intelligence, and other bureaucratic
6 entities is a known fact that there's been -- the old question
7 is whether it's justified. Much of our infrastructure --
8 defined infrastructure was destroyed. Part of that process is
9 actually -- and says they took documents, actually deliberately
10 seized documents. Again, ought to be justified. It's not an
11 issue here for any of us whether that was justified.

12 But the fact is that it is difficult, to say the
13 least, for us to try to find documents from ten years ago under
14 all -- any circumstances, particularly those. When we find
15 them, we produce them. We are not withholding responsive
16 documents because of any of that. We're getting them to the
17 plaintiffs in more than plenty of time for them to have noticed
18 depositions, conducted other discovery or complain to you
19 sometime before last night. And while detailed aft -- we'd
20 like to set up a schedule to respond to this lengthy paper and
21 get it to you. In the meanwhile, we all have your admonition
22 that we should not assume anything as to what the ruling will
23 be.

24 MR. SCHOEN: Judge, very briefly, I hear everything
25 the Court has said about not considering what we say. I just

1 can't sit here and take it every time. The idea that this
2 fellow would raise the destruction of documents once again
3 knowing that he's sat in Israel during the depositions when one
4 after another witness testified they just couldn't come up with
5 any documents with Kalkilia. All that -- Israel kept raiding
6 them and taking the documents and destroying until we got
7 another witness, maybe the first honest one who was testifying,
8 "Well, where did you get that information from?" "The archives
9 from the documents in Kalkilia." "Archives from documents in
10 Kalkilia? Documents we just heard were destroyed by all these
11 other witnesses?" It sounds reasonable to say, you know,
12 "occupied," "Israel came in and destroyed the infrastructure,"
13 et cetera, et cetera. That stuff sounds reasonable to someone
14 like this, but when we know that the facts from the witnesses'
15 own mouths undercut, it's difficult to understand why they
16 would raise that kind of thing, but we'll have our chance in
17 reply, I'm sure.

18 THE COURT: How fast can you respond?

19 MR. HILL: Yes, Your Honor. We have a holiday coming
20 up. Our normal response would be due, I think by calculating
21 like a week from Friday. Is that -- I could try and do it
22 sooner, but I've got just -- you haven't read it yet, but
23 Mr. Tolchin submitted a 33-page declaration about dozens of
24 different issues and I've got to go through emails and come up
25 with a response to all that stuff from what I understand you

1 want us to do.

2 I could suggest a shortcut. I don't know if the
3 Court is inclined to take it, but let me just call your
4 attention. I know you haven't read this yet and Mr. Schoen is
5 going to give it to you, but when we were in court with Judge
6 Daniels he actually prohibited this sort of a filing without a
7 prefiling conference with you and this may be the answer that
8 allows us to not have to file an opposition. Let me just make
9 the point.

10 So this is on page 82 of the transcript before Judge
11 Daniels from August 9th of this year starting at line 15. He
12 says:

13 "So I think that the appropriate thing is to move
14 forward efficiently with discovery at this point. I think that
15 I'm not satisfied with the pace of discovery. I think I told
16 Magistrate Ellis that I expected him to be firm with discovery.
17 I have also indicated to him that any position if I deny the
18 motions that are outstanding here, my issue is going to be that
19 any position is going to be that other than one summary
20 judgment motion after the close of discovery there are to be no
21 other motions filed without first a premotion conference with
22 Magistrate Judge Ellis and that premotion conference must be
23 preceded by no more than a two-page letter indicating what the
24 nature of the motion is that the parties believe are
25 appropriate at this stage of the proceeding and the nature of

1 the motion and the underlying bases for the motion and why the
2 motion is timely made and is not premature in discovery."

3 So that's an expressed direction of the District
4 Court that prevented the filing that was made last night. In
5 addition to that, there is the Local Rule that requires a
6 prefiling letter and there is the Federal Rule which requires a
7 prefiling conference with opposing counsel which did not happen
8 here. And so I'm happy to submit a response of whatever
9 schedule the Court wants me to do --

10 THE COURT: What about the procedural --

11 MR. HILL: -- in recognition of the fact
12 that [indiscernible] --

13 THE COURT: What about the procedural issue?

14 MR. SCHOEN: A couple things, Judge, I guess. The
15 Court will read it in context. It's like the little boy who
16 kills his parents and now he's an orphan. What Judge Daniels
17 was complaining about, the three frivolous motions to dismiss
18 the day of filing. He didn't want to see any more of those.
19 What he read is accurate language. That's what precipitated
20 all that. No one has been following the practice of the two-
21 page premotion letter anyway, and these are ongoing problems in
22 this case.

23 With respect to the Local Rules and the Federal Rule,
24 it's not a discovery motion. It's a scheduling order motion.
25 That's specifically -- made it a Rule 16 motion and laid that

1 out in the beginning of it. My understanding is that the Local
2 Rule may [indiscernible] Your Honor's individual practices. I
3 don't recall right now. Distinguishes between discovery
4 motions and other kinds of motions and specifically said for
5 discovery motions prefiling -- pre-motion letter and not for
6 non-discovery motion. I could be mis-recollecting if the Local
7 Rule is Your Honor's individual practices. That's my
8 recollection.

9 MR. HILL: I'll make the point, Your Honor. This is
10 the only motion that's been filed since August and this is the
11 one that appears to me facially to violate the directive of
12 Judge Daniels and I would submit that you'd be justified in
13 denying it on that ground --

14 THE COURT: This is the same transcript that you just
15 gave me, though, right?

16 MR. HILL: Initially.

17 THE COURT: I'll -- let me look at the transcript.
18 As I said, you know, it's still Judge Daniels's case, so
19 whatever he ruled it's still the law of the land and it's my
20 job to interpret it.

21 MR. HILL: Let me make one request which is not
22 technically a motion that I technically [indiscernible].
23 Mr. Rochon said a couple times that we're 30 days from the end
24 of discovery. We're technically 31 days and as you know in the
25 Local Rule 30 days from the close of discovery you're allowed

1 to serve contention interrogatories. We've prepared our
2 contention interrogatories. I would ask the Court's leave to
3 hand serve them on the plaintiffs today. If they want to have
4 31 days to respond that's fine with me, but rather than trying
5 to figure out how to serve them tomorrow in New York and
6 Alabama or wherever Mr. Schoen had requested we serve.

7 MR. SCHOEN: And, Judge, this is what I mean how it
8 goes. You know, only see half of the equation each time. The
9 complaint is, they've only taken two depositions all this time.
10 Why are they just now serving their contention interrogatories?
11 This is the same pattern we see in each of these cases. They
12 wait till the last minute on all sorts of stuff. Also,
13 complaint --

14 THE COURT: But you should wait to file contention
15 interrogatories.

16 MR. HILL: That's what the Local Rule requires.

17 MR. SCHOEN: Judge, the only discovery has been taken
18 is on damages otherwise. I'm happy to --

19 THE COURT: You may file your contention
20 interrogatories.

21 MR. HILL: Thank you, Your Honor. Unless you have
22 anything further, we'll --

23 THE COURT: And not having seen them, that does not
24 prejudice you from -- this will be an issue and we'll resolve
25 it if there are any issues that come up about it, but once it's

1 timely done we'll ultimately resolve it whether or not there --
2 you have problems with it or not, so --

3 MR. HILL: I don't have anything further for Your
4 Honor at this time.

5 THE COURT: Okay. By Friday, a week, you'll --
6 I'm interested in seeing what Judge Daniels said. I'm sure he
7 gave you the message that he wants this to move along, if
8 nothing else.

9 MR. HILL: Your Honor, unless we had an order from
10 you by a week from Friday, we will file an opposition to the
11 motion.

12 THE COURT: Fair enough.

13 MR. HILL: Thank you, Your Honor.

14 THE COURT: All right.

15 MR. SCHOEN: Reply one week from then, Judge?

16 THE COURT: Well, why don't we say that if there's
17 going to be a reply it be done the Wednesday after. A reply
18 should not take so long.

19 MR. SCHOEN: Just confirm a date, Judge.

20 THE COURT: The 30th is a week and then the 5th of
21 December.

22 MR. HILL: No, I believe it's -- you may be
23 [indiscernible] an extra week. We'll file on the 30th, yes, at
24 this point.

25 THE COURT: Right.

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MR. HILL: Okay.

THE COURT: The 30th and the 5th.

MR. HILL: Yes, Your Honor.

MR. ROCHON: Are we otherwise excused, Your Honor?

THE COURT: You're excused.

MR. HILL: Thank you.

* * * * *

1 I certify that the foregoing is a court transcript from an
2 electronic sound recording of the proceedings in the above-
3 entitled matter.

4
5 _____
6 RUTH ANN HAGER, C.E.T.**D-641

7 Dated: November 27, 2012
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